FILE
DEC 23

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-337

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,
Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,
Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

PAGE

Statement of Case 1

POINT I—The ordinance is clearly overbroad and presumptively invalid as a system of prior restraint on speech 3

POINT II—Abstention is inappropriate herein 7

Conclusion 11

TABLE OF CASES

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58, 83 S.Ct. 631 3

California v. *La Rue*, 409 U.S. 109 3

Carrol v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 89 S.Ct. 347 3

Dombrowski v. *Pfister*, 380 U.S. 479 (1964) 7, 9

Hudson v. *United States*, 234 A. 2d 903 3

Lewis v. *City of New Orleans*, 415 U.S. 130 (1974) .. 6

Long Island Vietnam Moritorium Committee v. *Cahn*, 437 F.2d 344 (CA 2 1970) 7

Miller v. *California*, 413 U.S. 15 ..... 4, 5

NAACP v. *Button*, 371 U.S. 415 6

N. Y. Times Co. v. *U.S.*, 403 U.S. 713, 91 S.Ct. 2140 .. 3

Organization for a Better Austin v. *Keefe*, 402 U.S. 58, 91 S.Ct. 1574 3

PAGE

P.B.I.C., Inc. v. *Byrne*, 313 F. Supp. 757 (Three Judge Court), rev. on other grounds 3

People v. *Conrad*, 334 N.Y.S. 2d 180 3

People v. *Wendling*, 258 N.Y. 451 3

Roth v. *United States*, 354 U.S. 476 4

Smith v. *California*, 361 U.S. 151 7

Staub v. *City of Baxley*, 355 U.S. 313 7

Steffel v. *Thompson*, 415 U.S. 452 .....8, 9, 10

Thornhill v. *Alabama*, 310 U.S. 88 ..... 6, 7

Winters v. *People of State of New York*, 333 U.S. 507 7

Younger v. *Harris*, 401 U.S. 37 (1971) 8, 9

Zwickler v. *Koota*, 389 U.S. 241 (1967) 7, 8

STATUTE AND RULE CITED

Rule 16, Rules of Supreme Court of the United States 1

Article 235, New York State Penal Law 6

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Appellees, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, move that the final judgment of the Court of Appeals be affirmed or, in the alternative, that this appeal be dismissed.

Statement of Case

Plaintiffs are the owners and operators of bars in Nassau County which provide live topless dancing entertainment by professional dancers who perform on a stage in a

decorous manner for the entertainment of forewarned consenting patrons.

On July 17, 1973, the Town of North Hempstead adopted Local Law No. 1-1973, which made unlawful the appearance of women with uncovered breasts in any public place and in addition, made unlawful the permitting of entertainment involving "topless women" in public places. Within the scope of activities prohibited by the Law was the type of dancing entertainment provided in plaintiffs' establishments. Because the Law made plaintiffs' dancing entertainment unlawful and because plaintiffs feared arrest and prosecution if they violated the Law, plaintiffs ceased on the date that the Law became effective to provide topless dancing entertainment for its patrons. This cessation caused plaintiffs to sustain severe economic loss and threatened them with insolvency and their employees with unemployment.

Faced with the likelihood of going out of business, plaintiffs filed a civil action to declare that Law unconstitutional as overbroad and in violation of the First Amendment and requested an injunction to halt its enforcement. At the same time, plaintiffs applied, in vain, for the issuance of a temporary restraining order.

Thereafter, plaintiff, M & L Rest., Inc., faced with immediate economic ruin, resumed providing topless dancing entertainment for its patrons. Immediately a series of eight multiple, repetitive harassing criminal prosecutions were commenced against Nicholas Benevento, president of M & L Rest., Inc. and his dancers notwithstanding the fact that defendants were aware of the pendency of the Federal action and the imminence of a determination of the constitutional issue raised therein. The remaining plaintiffs obeyed the Law attacked herein until the injunction was issued.

POINT I

The ordinance is clearly overbroad and presumptively invalid as a system of prior restraint on speech.

Appellants seek a determination by this Court that the ordinance attacked is entitled to a presumption of constitutionality as a valid exercise of police power. They fail to acknowledge the preferred position granted First Amendment rights by our Constitution. They thus say at page 10 of their jurisdictional statement, "Where the classification is broad so as to be 'debatable' the legislative judgment must stand."

It is respectfully submitted that such is not the law with respect to speech inhibiting legislation. As has often been held by this Court, any system of prior restraints of expression bears a heavy presumption against its constitutional validity. *N. Y. Times Co.* v. *U. S.*, 403 U.S. 713, 91 S. Ct. 2140; *Organization for a Better Austin* v. *Keefe*, 402 U.S. 58, 91 S. Ct. 1574; *Carrol* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 83 S. Ct. 631.

That the dance is a form of expression protected by the First Amendment of the United States Constitution is no longer a subject of dispute. *California* v. *LaRue*, 409 U.S. 109; *Hudson* v. *United States*, 234 A. 2d 903; *People* v. *Wendling*, 258 N.Y. 451; *People* v. *Conrad*, 334 N.Y.S. 2d 180; *P.B.I.C., Inc.* v. *Byrne*, 313 F. Supp. 757 (Three Judge Court), rev. on other grounds.

In what is undoubtedly the most thorough and exhaustive opinion on First Amendment protection of sexually oriented live performances, a three Judge Federal Court in Massachusetts, in the case of *P.B.I.C.* v. *Byrne, supra*, enjoined the prosecution by the State of Massachusetts of the show "Hair" under a lewdness statute or under the common law of indecent exposure. After concluding that "live

theatre productions like movies, are within the ambit of protection of the First Amendment" (page 762), and that "obscenity" in a First Amendment context is not protected from state regulation but that which falls short of it is (page 763), the Court concluded "that this same 'obscenity' standard also applies to the regulation of live theatre production" (page 763). The Court then goes on to explain its rationale for the foregoing conclusion by stating,

> "Confining state interference with the live theatre to that which is 'obscene' reflects the fundamental importance which the First Amendment attaches to the unencumbered expression of ideas." (page 764)

In *Roth* v. *United States,* 354 U.S. 476, the Supreme Court, for the first time, squarely decided that expression presumptively protected by the First Amendment could be denied that protection providing it met a three prong test of obscenity under a statute adopting such test. It did, nevertheless, make it clear that nudity did not constitute obscenity unless it met the proscription dictated in that three prong test. The Court stated,

> "However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." (page 487)

In the recent reformulation of the three prong test of obscenity in the case of *Miller* v. *California,* 413 U.S. 15,

this Court did not depart from its basic holding that the First Amendment protects all literary, artistic, political or scientific expression except that which is obscene, saying at pages 23-24:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."

The Court goes on to state at page 27,

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

From the foregoing it is abundantly clear that expression presumptively protected by the First Amendment such as the dance performances which are prohibited across the board by the instant ordinance, cannot be proscribed except under an obscenity statute which is drawn in conformity with the constitutional mandates set forth in *Miller* v. *California*. It is also abundantly apparent that the ordinance involved in the instant proceeding does not, as written or as heretofore authoritatively construed, embody the three prong obscenity test set forth in *Miller*.

The ordinance thus "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech" and is, therefore, overbroad and constitutionally infirm. *Thornhill* v. *Alabama,* 310 U.S. 88, 97. This overbreadth places a chill on the exercise of First Amendment rights that cannot be tolerated.

It would be no answer to a claim of overbreadth to say that the law would be applied to one type of nude dancing and would not be applied to another. It is unconstitutionally overbroad if it *may* be applied to protected expression. *Lewis* v. *City of New Orleans,* 415 U.S. 130 (1974); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 599. Thus in *NAACP* v. *Button,* 371 U.S. 415, 432-433, the Supreme Court held:

> "The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute *susceptible* of sweeping and improper application." (Italics supplied)

Lest it be thought that the invalidation of the Ordinance will deny local authorities any effective means of preventing obscene exhibitions, it should be noted that New York State has ample penal legislation in the form of the recently revised Article 235 of its Penal Law to insure that obscene performances will not go unpunished in the State of New York. The invalidation of the Ordinances herein as applied to presumptively protected expression will not impair the State's legitimate aims and means with respect to defending its citizens against obscene and thus unprotected speech.

The Ordinance attacked herein as applied, contains sweeping general prohibitions resulting in a dire chilling of First Amendment rights. As the Supreme Court ob-

served in *Smith* v. *California*, 361 U.S. at 151:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill* v. *State of Alabama*, 310 U.S. 88, 97-98; Cf. *Staub* v. *City of Baxley*, 355 U.S. 313.
>
> "And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril herein, because the free dissemination of ideas may be the loser. *Winters* v. *People of State of New York*, 333 U.S. 507, 509-510, 517-518."

POINT II

Abstention is inappropriate herein.

It is well established and the Court below held, that where an action challenges local law as being violative of the First Amendment on its face a federal court must decide the issues on the merits and not abstain. *Zwickler* v. *Koota*, 389 U.S. 241, 248-252 (1967); *Dombrowski* v. *Pfister*, 380 U.S. 479, 483-485 (1964); *Long Island Viet Nam Moritorium Committee* v. *Cahn*, 437 F. 2d 344, 345-350 (CA2 1970). The rejection of abstention in such cases results from the paramount importance of removing the inevitable chilling effect on First Amendment rights that such a statute invariably establishes. As this court has held, relegating a plaintiff to a state court to vindicate First Amendment rights after a federal action had been commenced would not only be unwise but would constitute an

abrogation by federal courts of their prime responsibility to uphold constitutional liberties. See: *Zwickler* v. *Koota, supra; Dombrowski* v. *Pfister, supra; Steffel* v. *Thompson,* 415 U.S. 452.

In *Zwickler, supra,* at 252, this Court stated:

> ". . . Congress imposed the duty upon all levels of the Federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . .' Robb v. Connoly, 111 U.S. 624. We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."
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> • • •
>
> "These principles have particular significance, when, as in this case, the attack upon the statute upon its face is for repugnancy to the First Amendment. In such a case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."

This doctrine of non-abstention by a federal court in cases challenging statutes and ordinances on First Amendment grounds was modified in 1971 by the Supreme Court decision in *Younger* v. *Harris,* 401 U.S. 37 (1971). In that case this court stated that dictates of comity require that a federal court abstain from deciding a First Amendment

challenge to an ordinance or statute where at the time the federal action is commenced there is pending a state court criminal prosecution against the plaintiff in the federal action. The court, however, was careful to observe that its holding in no way changed the *Dombrowski* doctrine of non-abstention in cases where there was no state criminal proceeding pending against the federal plaintiff at the time the federal action was begun. Thus, the court stated, 402 U.S. at p. 41:

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun."

The court went on to say:

> "A choice of a federal forum to vindicate first rights is entitled to significant weight in determining the availability of anticipatory rights."

The *Younger* v. *Harris* sextet of cases did not bar challenges to state statutes and ordinances. It merely narrowed the class of plaintiffs who could maintain such actions to those who were not involved in state criminal prosecutions under the attacked law at the time of the filing of the federal complaint. At least with respect to declaratory relief, the foregoing was made abundantly clear in *Steffel, supra.*

In the instant case, plaintiffs' action challenging the Law on First Amendment grounds was commenced before any state criminal prosecution was instituted. Even if the *Younger* doctrine would bar relief where a state criminal proceeding is subsequently commenced such a situation does not exist here. None of the Plaintiffs has ever been a defendant in a state criminal proceeding instituted under this Law. *Younger* is directed only towards those actually involved in such a proceeding.

Moreover, the commencement of eight prosecutions in the instant case removes it from the *Younger* v. *Harris* doctine. The court in *Younger* carefully pointed out that its holding was limited to a case involving a single prosecution where constitutional rights can be vindicated. The court noted at p. 49,

> "Here a proceeding was already pending in the state court, affording Harris an opportunity to raise his constitutional claims. There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected. In other words, the injury that Harris faces is solely 'that incidental to every criminal proceeding brought lawfully and in good faith,' *Douglas,* supra, and therefore under the settled doctrine we have already described he is not entitled to equitable relief 'even if such statutes are unconstitiutional,' *Buck,* supra."

The instant case does not involve one prosecution but involves eight arrests and eight separate criminal proceedings all begun within a four day period. The arrests and prosecutions continued until halted by the District Court. Clearly it was the defendants' intention to continue arrests and prosecutions until persons and organizations exercising First Amendment rights in violation of the law succumbed even if it resulted in the destruction of their businesses prior to a judicial determination on the merits.

The District Court was correct in not abstaining, and the Circuit Court properly agreed.

CONCLUSION

The judgment below should be affirmed or the appeal dismissed by reason of the manifest unsubstantiality of the questions raised.

Dated: New York, New York, December 12, 1974.

Respectfully submitted,

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